

PT 97-10  
Tax Type: PROPERTY TAX  
Issue: Charitable Ownership/Use

STATE OF ILLINOIS  
DEPARTMENT OF REVENUE  
OFFICE OF ADMINISTRATIVE HEARINGS  
CHICAGO, ILLINOIS

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SPACE BETWEEN	)	
CORPORATION	)	
d/b/a GREENVIEW ARTS CENTER,	)	
APPLICANT	)	DOCKET: 94-16-1490
	)	
v.	)	P.I.N.: 11-32-325-003
	)	
STATE OF ILLINOIS,	)	Alan I. Marcus,
DEPARTMENT of REVENUE	)	Administrative Law Judge

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RECOMMENDATION FOR DISPOSITION

APPEARANCES: Messrs. Mark Parts, Douglas D. Weinberg and Jeffery A. Greenblatt of Skadden, Arps, Slate, Meagher and Flom appeared on behalf of The Space Between Corporation.

SYNOPSIS:

This proceeding raises the issue of whether the subject parcel qualifies for exemption from 1994 real estate taxes under 35 ILCS 200/15-65.<sup>1</sup> In relevant part, that provision states that "[a]ll property of the following is exempt when actually and exclusively used for charitable or beneficent purposes, and not leased or otherwise used with a view to profit: (a) institutions of public charity ...[.]" The controversy arises as follows:  
On June 30, 1995, the Space Between Corporation, d/b/a Greenview Arts Center (hereinafter the "SBC," the "Center" or the "applicant"), through counsel, filed a real estate exemption complaint with the Cook County Board of (Tax) Appeals (hereinafter the "Board"). Said complaint alleged that the subject property was exempt from real estate taxation under 35 ILCS 200/15-65. Thereafter, the Board recommended to the Department of Revenue, (hereinafter the "Department") that the requested exemption be denied. On February 1, 1996 the Department

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<sup>1</sup>. In People ex rel Bracher v. Salvation Army, 305 Ill. 545 (1922), the Illinois Supreme Court held that the issue of property tax exemption will depend on the statutory provisions in force at the time for which the exemption is claimed. This applicant seeks exemption from 1994 real estate taxes. Therefore, the applicable statutory provisions are those contained in the Property Tax Code, 35 ILCS 200/1-1 *et seq.*

approved this recommendation by issuing a certificate finding that the property is not in exempt ownership and not in exempt use. Applicant filed a timely request for hearing February 19, 1996. After a pre-trial conference, an evidentiary hearing was conducted June 27, 1996. Following submission of all evidence and a careful review of the record, it is recommended that the subject parcel not be exempt from real estate tax for the 1994 assessment year.

**FINDINGS OF FACT:**<sup>2</sup>

A. Preliminary Considerations and Description of the Subject Property

1. The Department's jurisdiction over this matter and its position therein are established by the admission into evidence of Dept. Group Ex. No. 1 and Dept. Ex. Nos. 2 and 3.

2. The subject parcel is located at 6416 North Greenview, Chicago, IL 60626. It is identified by Permanent Index Number 11-32-325-003. Dept. Group Ex. No. 1.

3. The parcel features 8,118 square feet of land and is improved with a two-story building of unspecified square footage which applicant uses as a performing arts center. *Id.*

4. The lower level contains an office, four restrooms (two toward the front, two toward the back), a kitchen/sculpture studio, a furnace room, a gallery, a gallery lobby, a rehearsal hall and a prop/storage room. Applicant Ex. No. 13.

5. The upper level contains a box office, a 200 seat theater, a theater office, a shop, two dressing/class rooms, and another classroom which can be divided in half when necessary. *Id.*; Tr. p. 41.

6. Applicant's founder, John Kirk, (hereinafter "Kirk"), purchased the property in his capacity as a private individual on November 26, 1990. He and his wife subsequently entered into a trust agreement with First Chicago Trust Company of Illinois. This trust vested the Kirks with a 100% beneficial

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<sup>2</sup>. In order to facilitate better organization and promote greater clarity, I have divided the Findings of Fact into the following categories: Preliminary Considerations and Description of the Subject Property (Findings 1 through 7); Applicant's Organizational Structure (Findings 8 through 14); Applicant's Financial Structure (Findings 15 through 25); and Applicant's Operations and Use of the Subject Parcel (Findings 26 through 55).

interest, as joint tenants with right of survivorship, in the subject premises. Applicant Ex. Nos. 5, 6.

7. The Kirks assigned the entirety of their beneficial interest to applicant on December 29, 1993. Applicant Ex. Nos. 7, 8.

B. Applicant's Organizational Structure

8. Kirk, a professor at Illinois State University, founded SBC in May, 1989. Tr. p. 6. His founding purposes were to train young artists, bring artistic performances to the community of Rogers Park and engage in other activities related to the performing arts. Tr. p. 8.

9. Applicant was incorporated under the General Not For Profit Act of Illinois on May 25, 1989. Its Articles of Incorporation indicate that SBC is organized for "the promotion and engagement in the performing arts, including but not limited to the training of participants in the theater arts and the provision of teaching, performance and residential facilities in support thereof[.]"<sup>3</sup> Applicant Ex. No. 1.

10. SBC filed an amendment to its original Articles of Incorporation on February 6, 1992. In substance, said amendment provides that, in the event of dissolution, applicant's Board of Trustees shall, after paying or making provision for payment of all appropriate corporate liabilities, dispose of any remaining assets in such a manner as to further the center's stated purposes; or, distribute such assets to other organizations which, at the time, qualify for exemption under Section 501(c)(3) of the Internal Revenue Code of 1954 or any successor provision thereof. *Id.*

11. SBC adopted by-laws on August 18, 1992. These by-laws, which were in effect during the entire 1994 assessment year, do not contain a purpose

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<sup>3</sup>. The Articles [Applicant Ex. No. 1] go on to provide that ... "the corporation shall be administered and operated exclusively for the purposes set out above, and; [sic] in Article 5[.]" However, the copy of the Articles which applicant submitted into evidence did not contain Article 5 even though other provisions indicate that it was to be attached to the original document and incorporated by reference therein. See, Applicant Ex. No. 1.

statement. They do, however, provide for creation of a Board of Directors (hereinafter the "Board") which consists of not less than three members. Applicant Ex. No. 4.

12. The Board may be enlarged by amendment to the by-laws, or, if necessary, amendment to the Articles of Incorporation. *Id.* It is responsible for managing applicant's daily business affairs, specifically:

In and about the management of the affairs of the corporation and more particularly as the same relates to entering into leasing or other service agreements between the corporation and others, the board, in its discretion, may authorize charging for the use of the premises or other services within the premises owned by the corporation based upon the ability of party [sic] to whom space or service is to be rendered to pay for the same, including charging nothing for the leasing of the premises or the provision of services if such is warranted by the financial condition of the party to ... use the space or obtain the services.

*Id.*

13. On February 26, 1992 the Internal Revenue Service granted applicant an exemption from federal income taxation. This exemption was granted pursuant to Section 501(a) of the Internal Revenue Code and based on the Service's conclusion that SBC qualified as an organization described in Section 501(c)(3) of that statute. Applicant Ex. No. 2.

14. The Department granted applicant an exemption from Use and related taxes on April 5, 1991. Its exemption number is E9966-1292-01. Applicant Ex. No. 3.

C. Applicant's Financial Structure

15. Applicant's corporation has no capital stock or members. Its fiscal year runs from July 1 through June 30. Tr. p. 29; Applicant Ex. Nos. 9, 10 & 11.

16. SBC's total income for the fiscal year ending June 30, 1994 amounted to \$108,145.79. Its expenses for the same period were \$106,140.84. Applicant Ex. No. 10.

17. Revenues and support for the above fiscal year were attributable to the following sources:

A. Unspecified Transfers	\$50,907.52
B. Gallery Operations	\$18,457.65
C. Theater Operations	\$25,797.40
D. Special Events	\$ 1,784.10
E. Rentals	\$ 2,745.00
F. Other Unspecified Income	<u>\$ 8,454.12</u>
E. Total Support & Revenues	\$108,145.79 <sup>4</sup>

*Id.*

18. Expenses for the above fiscal year were apportioned as follows:

A. Salaries	\$14,930.36
B. Advertising	\$ 1,192.81
C. Printing	\$ 2,468.28
D. Debt Service	\$26,087.88
E. Gas	\$ 4,583.82
F. Unspecified Professional	\$ 275.03
G. Water and Electric	\$ 4,519.77
H. Garbage Collection	\$ 628.00
I. Office	\$ 1,709.10
J. Insurance	\$ 2,672.80
L. Janitor	\$ 2,276.59
N. Maintenance	\$ 3,961.63
O. Professional Fees	\$ 4,405.86
P. Capital Improvements	\$ 298.76
Q. Taxes	\$18,405.34
R. Telephone	\$ 2,964.84
S. Contract Labor	\$ 712.00
K. Miscellaneous	<u>\$14,047.97</u>
L. Total expenses	\$106,140.84 <sup>5</sup>

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<sup>4</sup>. Based on the numbers set forth above, I conclude that 47.1% of applicant's total revenues and support for the fiscal year ending June 30, 1994 were attributable to unspecified transfers. I further conclude that such numbers establish the following schedule of sources for any remaining revenues and support: 17.1% from gallery operations; 24.5% from theater operations; 1.65% from special events; 2.54% from rentals and 7.82% from other unspecified income.

The above percentages (as well as those set forth in footnotes 5, 6 and 7) were derived by dividing the item in question (i.e. revenue from gallery operations) by the appropriate revenue or expense total.

<sup>5</sup>. The above numbers lead me to conclude that applicant's total expenses for the fiscal year ending June 30, 1994 were apportioned according to the following percentages: 14.1% to salaries; 2.3% to printing; 24.6% to debt service; 4.3% to gas; 4.26% to water and electric; 1.6% to office; 2.5% to

*Id.*

19. Applicant's total income for the fiscal year ending June 30, 1995 amounted to \$87,735.20 Its expenses for the same period were \$85,972.29. Applicant Ex. No. 11.

20. Revenues and support for the above fiscal year were attributable to the following sources:

A. Art Gallery	\$ 2,900.00
B. Bank Interest	\$ .43
C. Concessions	\$ 86.83
D. Gallery Theater	\$ 14,973.10
E. Gifts	\$ 3,117.00
F. Greenview Classes	\$ 775.00
G. Other Income	\$ 3,374.09
H. Rentals	\$ 15,569.90
I. Starting Balance	\$ 2,918.24
J. Theater #1	\$ 22,667.50
K. Unspecified Transfer	\$ 8,960.00
L. Other Unspecified Income	\$ 12,393.11
M. Total Support & Revenues	\$ 87,735.20 <sup>6</sup>

*Id.*

21. Expenses for the above fiscal year were apportioned as follows:

A. Advertising	\$ 1,071.48
B. Capital Improvement	\$ 1,414.24
C. Co-Production	\$ 2,380.74
D. Debt Service	\$ 26,038.95
E. Electric & Water	\$ 4,140.13
F. Garbage	\$ 760.00
G. Gas	\$ 3,379.07
H. Insurance	\$ 609.20
I. Janitorial	\$ 3,879.82
J. Legal & Professional Fees	\$ 2,564.14
K. Miscellaneous	\$ 7,043.57
L. Office Expenses	\$ 1,793.09
M. Printing	\$ 2,165.10
N. Repairs	\$ 2,341.38

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insurance; 2.1% to janitor; 3.7% to maintenance; 4.15% to professional fees; 17% to taxes; 2.8% to telephone; 13.2% to miscellaneous and 1% or less each to advertising, professional, garbage collection, capital improvements and contract labor.

<sup>6</sup>. Based on the numbers set forth above, I conclude that 25.8% of applicant's total revenues and support for the fiscal year ending June 30, 1995 were attributable to Theater 1 operations. I further conclude that such numbers establish the following schedule of sources for the remaining revenues and support: 3.3% from the art gallery; 17% from the gallery theater; 3.5% from gifts; 3.8% from other unspecified income; 17.74% from rentals; 3.3% from starting balance; 10.2% from an unspecified transfer; 14.1% from other income and 1% or less each from bank interest, concessions and Greenview classes.

O. Salary	\$ 14,574.22
P. Tax	\$ 4,823.57
Q. Telephone	\$ 3,368.84
R. Other Unspecified Expenses	\$ 3,624.75
S. Total expenses	\$ 85,972.29 <sup>7</sup>

*Id.*

22. All excess revenues from the above fiscal years were used to defray applicant's operating expenses. Tr. p. 31.

23. Kirk also helped to defray these expenses and capitalize SBC's operations by making various loans to the applicant. Kirk made these loans in his capacity as a private individual and obtained funds therefor by carrying a third-position mortgage on the premises. Tr. pp. 52-57; Applicant Ex. No. 16.

24. Kirk allowed interest to accrue on all the loans. He did collect any interest payments even though the rates he charged varied between 7.0% and 7.5%. Tr. pp. 56-57.

25. Kirk forgave all the loans and has not personally collected any payments thereon. However, on June 30, 1994, these debts were consolidated into a single mortgage loan by action of applicant's board of directors. Tr. pp. 53-54.

#### D. Applicant's Operations and Use of the Subject Parcel

26. SBC negotiates and enters into facilities usage agreements (hereinafter "FUAs") with individual artisans, performing organizations, teachers, and community groups that rehearse and perform in its theaters, exhibit in its galleries and use the center for other purposes, such as holding classes and meetings. Tr. pp. 32, 46, 59, 73.

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<sup>7</sup>. The above numbers lead me to conclude that applicant's total expenses for the fiscal year ending June 30, 1995 were apportioned according to the following percentages: 1.2% to advertising; 1.6% to capital improvement; 2.8% to co-production; 30% to debt service; 4.5% electric and water; 3.9% to gas; 4.5% to janitorial; 3% to legal and professional fees; 8% to miscellaneous; 2% to office expense; 2.5% to printing; 2.7% to repairs; 17% to salaries; 5.6% to tax; 3.9% to telephone; 4.2% to other expenses and 1% or less each to garbage and insurance.

27. Applicant's corporation does not charge admission to any of the performances or exhibitions which take place at the center. Such charges are imposed by the performing companies themselves, which do not remit any resulting revenues to the center unless specifically required to do so by their FUAs. Tr. pp. 46-47.

28. In general, the FUAs require the user to pay a sum certain (hereinafter referred to as a "user fee") in exchange for access to the particular space (i.e. theater, gallery, etc.) which it in turn may use for a specifically delineated purpose. Applicant Group Ex. No. 12.

29. Applicant's base user fee for the main theater in 1994 was \$1,500.00 per week. Only one theater group, Pintig Theater, paid the full rate. However, this group also received a \$300.00 rebate, which made their actual user fee \$1,200.00. Tr. pp. 35-36, 65-66.

30. The remaining user fees were variable. They reflected consideration of the individual user's resources and ability to pay. In most cases, user fees for the main theater ran between \$500.00 and 750.00 per week. Fees for the gallery were usually \$250.00 to \$350.00 per week. Applicant Group Ex. No. 12; Tr. pp. 35-36, 58, 67- 68.

31. Applicant usually agreed to these reductions in exchange for a percentage guarantee. These guarantees, set forth in appropriate FUAs, were designed to make the main theater accessible to performing groups that ordinarily could not afford to use its space. Tr. p. 36.

32. The guarantees allow the center to take the higher of the negotiated base rate or a certain percentage of gross sales once the user's income reached a certain level.<sup>8</sup> SBC accepts the base rate if the user does not generate enough sales to reach the agreed income level. Applicant Group Ex. No. 12; Tr. p.36.

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<sup>8</sup>. Applicant's usual agreement was to take 40% of gross sales once income reaches \$2,000.00 and 10% of income over \$3,500.00. Applicant Group Ex. No. 12; Tr. p. 36.



33. In addition to setting forth the parties' agreement as to user fees and percentage guarantees, all FUAs specifically provide that:

A. The user must pay a one-time security deposit upon signing the FUA. The exact amount of the security deposit varies. Nevertheless, applicant reserves the right to (at its discretion) refund the deposit or apply any portion thereof to unpaid rent;

B. The user must pay all fees due in a timely manner and pay any charges for additional rehearsals, overtime, extra rooms, etc. when billed;

C. Fees are non-refundable;

D. Applicant is not obligated to provide possession or use of the premises unless user has made all payments due;

E. The center may, without further notice of any kind to the user or anyone else, refuse to open the doors until user has made appropriate payments;

F. Applicant shall retain any monies already paid in the event that the user defaults on any payment due;

G. User shall assume responsibility for promoting, marketing, advertising and disseminating information about the activity for which the facility is used. Such responsibility includes notifying applicant of any promotional information which user wishes to include in the center's regular publications;

H. The user agrees to provide tickets to its performances based on the seating schematic provided by the center and is responsible for any errors in the ordering or printing of reserved seat tickets;

I. The user shall assume full responsibility for ticket sales and shall indemnify the center against any claims against it due to ticketing errors;

J. The user agrees to honor all promotional discounts and coupons generated by the center or the Rogers Park Theater Coalition;

K. The user agrees to indemnify and hold the center harmless against liability claims and suits arising out of its use and occupancy and either provide applicant with a certificate of insurance with applicant named as additional insured or choose to be covered under the center's insurance policy at the cost of twenty five cents per ticket sold, per registered student or per participant.

L. Failure to comply with the insurance requirements set forth in the preceding paragraph by one week prior to the

scheduled event shall render the FUA null and void and the deposit shall not be refunded.

M. The agreement is subject to renegotiation after each 30-day period during which the FUA is in effect.

Applicant Group Ex. No. 12.

34. Pursuant to FUAs, the following companies performed in applicant's theater facilities during the 1994 tax year: Single Action Theater, which performed the plays "Bingo" and "Point of Honor;" National Pastime Theater, which performed "Orestes;" Tight & Shiny Theater, which performed "Battery;" Georgie's Stages, which performed "Blanket Hill;" Studio 108, which performed "Tiny Harvest;" Tinfish Productions, which performed "Childe [sic] Byron;" Pinting Theater, which performed "Kin;" Shakespere's Herd, which performed "Taming of the Shrew;" The Soul Company, which performed "Hair" and the Jerico Theater, which performed "Joe's Wife, John." Applicant Ex. No. 15.

35. Of all the organizations that performed or exhibited at the center during 1994, only one theater group, the Tight and Shiny Theater, was allowed to use the premises without paying any user fees. Applicant did, however, require this group to sign an FUA which provided they would perform in kind services, such as painting, fixing up and building a marquee for the front of the building. Tr. pp. 37-39, 46.

36. SBC's main theater was the site of eight separate productions during the 1994 tax year. Some of the productions overlapped, with one company performing on Monday, Tuesday and Wednesday evenings and another performing in the same theater on Thursday, Friday, Saturday and Sunday nights. Despite the overlap, applicant and the theater groups arranged to strike sets in a manner that did not interfere with scheduled performances. Tr. p. 77.

37. Five shows were performed in applicant's gallery theater during 1994. All of these shows ran concurrently with art exhibits in that the art would be

displayed on the gallery walls while the gallery theater was being performed. Tr. p. 77.

38. Average attendance at SBC productions held in the main theater was approximately 125 patrons per week. Attendance at the gallery shows averaged about 30 people per week. Tr. pp. 69, 71, 78.

39. Attendance at art exhibits was somewhat less, with approximately 100 people (most of whom did not come after the opening) attending each show. Tr. p. 69, 71.

40. Each art show was curated by a different curator. This individual contracted with the center for use of its facilities and decided exactly how many artists would be in his or her show. Each show averaged approximately 20 artists. Tr. pp. 75-76.

41. SBC charged a hanging fee to organizers of the art shows held in its gallery. This fee, which applicant waived once during the 1994 tax year, was \$20.00 for each artist and covered three paintings. Any revenues raised by hanging fees were used to defray the gallery's operating costs, such as lighting, repainting and making necessary repairs after the exhibit closed. Tr. pp. 49, 83 - 84, 87.

42. The following organizations entered into FUAs for use of the center's Art Gallery during the 1994 assessment year: Potemkin Village Films for "Artists Helping Artists;" Illinois State University, for "The Big Draw," a graduate student competition and "Diversity in the Cornbelt;" Dehone-Greenvew [sic] for "People of Dehone;" K. Gauthier, who was affiliated with the center in an unspecified manner, for "Edgewater Visions;" F. Salerno, who was also associated with the center in an unspecified capacity, for "Images of the Parliament of World's Religions" and Amethyst Productions, for "Sumbul Nazir-Pakastani." Applicant Ex. No. 15.

43. People of Dehone was a photography exhibit which raised money for a local halfway house for battered wives and trouble families. Tr. p. 47. Applicant provided space for the exhibit free of charge. It did, however, receive 10% of the proceeds from any photographs sold at the exhibit. Tr. p. 47.

44. The center also did not charge Potemkin Village for use of the gallery during the "Artists Helping Artists" exhibit. Tr. pp. 49-50.

45. Applicant gave away free tickets in order to promote events at the center. Recipients of these tickets included aldermen, critics, actors and newspaper writers. SBC also admitted people who couldn't afford the admission fee provided they were willing to usher or perform other services at the center. Tr. p. 68-69, 82, 86.

46. SBC also provided the theater companies which used its facilities with a certain number of complimentary tickets. The companies could distribute these tickets to whomever they wanted. Tr. p. 82.

47. Applicant also provided marketing services to the theater companies. It did not charge for these services, which included placing ads in newspapers which advertised the center's activities. SBC also printed up and distributed fliers throughout the community. Tr. p. 85.

48. In addition to the above activities, applicant made its facilities available to church groups and other community organizations on an intermittent basis during 1994. These groups would use the space, which SBC often provided free of charge, mostly for various community-oriented meetings. Tr. pp. 33, 41, 80.

49. SBC also allowed teachers, who would contract for use of a portion of the facilities, to come in and teach classes relating to some aspect of the

performing arts. These classes were devoted to topics such as acting, directing or makeup but (taken as a whole) comprised less than 10% of the center's total activities. Tr. pp. 41, 70-71, 80.

50. The teachers themselves would establish the fee structure for their class. SBC then took a portion of that fee (the exact percentage of which was negotiated and partially based on the teacher's ability to pay) as a user fee. The center applied all revenues from such fees toward electricity, gas and other costs it incurred in providing space for the class. Tr. pp. 71, 78 - 80.

51. Average attendance at the classes ran between 6 and 14 people. Fee abatements, if any, were at the sole discretion of the instructor. Tr. pp. 71, 80

52. The center also held readings every other Tuesday night. These readings, which were open to the public, were publicized in The Chicago Tribune. Donations were collected at each reading even though there was no formal admission charge and people could get in for free. All monies raised were used to purchase refreshments and pay the performers. Tr. p. 62.

53. SBC also allowed two folk singers, Alice and Albert Williams, to use the back of the building for a coffee house. The Williams performed at the coffee house with other acts and invited an audience to attend their performances for donations. Patrons placed their donations into a fish bowl. No one was refused admission for failing to make a donation. Tr. pp. 81, 88.

54. Applicant kept one third of any proceeds collected in the fishbowl. It applied these monies toward expenses associated with operation of the coffee shop. *Id.*

55. SBC also operated a book exchange wherein people could trade literature. People involved in the exchange would take a book but leave another in its place. Tr. p. 81.

CONCLUSIONS OF LAW:

On examination of the record established this taxpayer has not demonstrated, by the presentation of testimony or through exhibits or argument, evidence sufficient to warrant exemption from 1994 real estate taxes. Accordingly, under the reasoning given below, the determination by the Department that the subject parcel does not satisfy the requirements for exemption set forth in 35 ILCS 200/15-65 should be affirmed. In support thereof, I make the following conclusions:

A. Constitutional and Statutory Considerations

Article IX, Section 6 of the Illinois Constitution of 1970 provides as follows:

The General Assembly by law may exempt from taxation only the property of the State, units of local government and school districts and property used exclusively for agricultural and horticultural societies, and for school, religious, cemetery and charitable purposes.

The power of the General Assembly granted by the Illinois Constitution operates as a limit on the power of the General Assembly to exempt property from taxation. The General Assembly may not broaden or enlarge the tax exemptions permitted by the Constitution or grant exemptions other than those authorized by the Constitution. Board of Certified Safety Professionals, Inc. v. Johnson, 112 Ill.2d 542 (1986). Furthermore, Article IX, Section 6 is not a self-executing provision. Rather, it merely grants authority to the General Assembly to confer tax exemptions within the limitations imposed by the Constitution. Locust Grove Cemetery Association of Philo, Illinois v. Rose, 16 Ill.2d 132 (1959). Moreover, the General Assembly is not constitutionally required to exempt any property from taxation and may place restrictions or limitations on

those exemptions it chooses to grant. Village of Oak Park v. Rosewell, 115 Ill. App.3d 497 (1st Dist. 1983).

Pursuant to its Constitutional mandate, the General Assembly enacted the Property Tax Code 35 **ILCS** 200/1-3 *et seq.* The provisions of that statute that govern disposition of the instant proceeding are found in Section 200/15-65. In relevant part, that provision states as follows:

All property of the following is exempt [from real estate taxation] when actually and exclusively used for charitable or beneficent purposes, and not leased or otherwise used with a view to profit.

(a) institutions of public charity.

35 **ILCS** 200/15-65.

It is well established in Illinois that a statute exempting property or an entity from taxation must be strictly construed against exemption, with all facts construed and debatable questions resolved in favor of taxation. People Ex Rel. Nordland v. Home for the Aged, 40 Ill.2d 91 (1968); Gas Research Institute v. Department of Revenue, 154 Ill. App.3d 430 (1st Dist. 1987). Based on these rules of construction, Illinois courts have placed the burden of proof on the party seeking exemption, and have required such party to prove, by clear and convincing evidence, that it falls within the appropriate statutory exemption. Immanuel Evangelical Lutheran Church of Springfield v. Department of Revenue, 267 Ill. App. 3d 678 (4th Dist. 1994).

#### B. The Basic Framework

In Methodist Old People's Home v. Korzen (hereinafter "Korzen"), 39 Ill.2d 149 (1968), the Illinois Supreme Court adopted the following definition of "charity" in analyzing whether appellant's senior citizens home was exempt from real estate taxes under the Revenue Act of 1939:

... a charity is a gift to be applied consistently with existing laws, for the benefit of an indefinite number of persons, persuading them to an educational or religious

conviction, for their general welfare - or in some way reducing the burdens of government.

39 Ill.2d at 157 (citing Crerar v. Williams, 145 Ill. 625 (1893)).

The Korzen court also observed that the following "distinctive characteristics" are common to all charitable organizations:

- 1) they have no capital stock or shareholders;
- 2) they earn no profits or dividends, but rather, derive their funds mainly from public and private charity and hold such funds in trust for the objects and purposes expressed in their charters;
- 3) they dispense charity to all who need and apply for it;
- 4) they do not provide gain or profit in a private sense to any person connected with it; and,
- 5) they do not appear to place obstacles of any character in the way of those who need and would avail themselves of the charitable benefits it dispenses.

*Id.*

Like Section 200/15-65, the statute at issue in Korzen used the word "exclusively" to modify "charitable ... purposes." Thus, in applying the above criteria, it must be remembered that "exclusively" means "the primary purpose for which property is used and not any secondary or incidental purpose." Korzen, supra at 157. See also, Gas Research Institute v. Department of Revenue, 145 Ill. App. 3d 430 (1st Dist. 1987); Pontiac Lodge No. 294, A.F. and A.M. v. Department of Revenue, 243 Ill. App. 3d 186 (4th Dist. 1993).

#### C. Applicant's Organizational Documents

The first step in determining whether an organization is charitable is to consider the provisions of its charter. Morton Temple Association v. Department of Revenue, 158 Ill. App.3d 794 (3rd Dist. 1987) (hereinafter, "MTA"). In making such consideration, it must be remembered that "statements of the agents of an institution and the wording of its governing documents evidencing an intention to use its property exclusively for charitable purposes do not relieve



such an institution of the burden of proving that its property actually and factually is so used." MTA at 796. Therefore, "it is necessary to analyze the activities of the [applicant] in order to determine whether it is a charitable organization as it purports to be in its charter." *Id.*

Bearing these principles in mind, I note that neither applicant's Articles of Incorporation (as submitted into evidence) nor its by-laws contain any specific wording or reference to charity. Illinois courts have, on more than one occasion, indicated that lack of such wording in organizational documents can provide evidence that the applicant is not in fact organized for exempt purposes. People ex. rel. Nordlund v. Association of the Winnebago Home for the Aged, 40 Ill.2d 91 (1968), (hereinafter "Winnebago Home"); Albion Ruritan Club v. Department of Revenue, 209 Ill. App.3d 914 (5th Dist. 1991). (hereinafter "ARC").

In addition, the dissolution clause contained in SBC's amended Articles of Incorporation amounts to a mere statement in applicant's organizational documents. As noted above, such statements may reflect applicant's intent to engage in exempt activity. They do not, however, excuse SBC from proving that the subject parcel was in actual, exempt use during 1994. MTA, *supra*.

A similar rationale applies to SBC's exemptions from federal income and Illinois use taxes. These exemptions, standing alone or taken in conjunction with the statements in applicant's organizational documents, do not establish that the subject parcel is in exempt use. People ex rel County Collector v. Hopedale Medical Foundation, 46 Ill.2d 450 (1970).

Moreover, while the center's income tax exemption establishes that SBC is a "charity" for purposes of Sections 501(a) and 501(c)(3) of the Internal Revenue Code, those Sections do not preempt Section 200/15-65 or the other statutory provisions governing exemption from real estate taxation. Consequently, none of the aforementioned documents (whether they be exemptions from Illinois use and federal income taxes or applicant's Articles of Incorporation and by-laws) are

dispositive of SBC's entitlement to exemption from real estate taxes under Illinois law. Therefore, MTA mandates that any remaining analysis must focus on whether applicant's actual operations and use of the subject parcel fall within the criteria established in Korzen.

D. The Primary Use

In People ex. rel. Baldwin v. Jessamine Withers Home, 312 Ill. 136 (1924) (hereinafter "Baldwin"), the Illinois Supreme court established the well-settled principle that "[i]f real estate is leased for rent, whether in cash or other form of consideration, it is used for profit." Baldwin at 140. Thus, "[w]hile the application of income to charitable purposes aids the charity, the primary use of [the parcel in question] is for [non-exempt] profit". *Id.*

Here, two aspects of Professor Kirk's testimony, combined with other factors set forth below, lead me to conclude that the subject property was primarily used for non-exempt leasing to theater groups and artisans who performed at the center during the 1994 tax year. Kirk testified (Tr. p. 32) that approximately 75% of the SBC's income comes from user fees and contracts. He also indicated that performances are the center's "major income producing activity." Tr. pp. 59 - 60.

This testimony is amply supported by the financial data set forth in Findings of Fact 17 and 20, *infra* pp. 5-6. The evidence pertaining to the fiscal year ending June 30, 1994 establishes that approximately 50% applicant's total revenues for that year came from unspecified transfers. Because such transfers were unspecified, I cannot determine if they came from public or private charities as required by Korzen. More importantly, I cannot ignore the fact that all but 7.82% of the remaining revenues and support came from various types of rental arrangements, such as gallery and theater operations.

If I assume, for the sake of argument, that the unspecified transfers came from Professor Kirk's loans, I still could not conclude that the subject parcel was used for exempt purposes during 1994. These loans were made in furtherance

of applicant's primary purpose, which I have previously found to be leasing to theater groups and other artisans.

Baldwin, *supra*, establishes that such a use is, by its very nature, a non-exempt business transaction. Therefore, I conclude that Kirk's loans to SBC, as well as his elections not to collect interest payments thereon and forgive any personal claims to the unpaid loan balances, constitute business decisions which, in and of themselves or combined with other factors, do not establish charitable operations or exempt use.

The evidence pertaining to the fiscal year ending June 30, 1995 bolsters the above conclusion. During this year, (which encompasses that portion of the 1994 tax year that ran from July 1 to December 31), applicant derived 25.8% of its total revenues and support from main theater operations. It also obtained 38.4%<sup>9</sup> of the remaining revenues from art gallery operations, theater gallery operations and other rentals. To the extent that all of these operations were undertaken pursuant to FUA's, I conclude that the vast majority (approximately 63.88%)<sup>10</sup> of applicant's total income for the 1995 fiscal year came from leasing-related transactions.

I also note that the evidence pertaining to FUA's suggests that applicant operates more like a non-exempt leasing company than a charitable institution. First, the record is devoid of any indication that applicant would allow a theater troupe or artisan to use its facilities without entering into an FUA. Rather, Professor Kirk's testimony (Tr. p. 46) clearly establishes that such agreements were a prerequisite to using the center's facilities. Therefore, while Kirk testified that "anyone" may perform at the center, (Tr. p. 26), the record establishes that its facilities are, in reality, open only to those who enter into FUA's and abide by the terms contained therein.

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<sup>9</sup>. I derived this total by adding the percentages attributable to art gallery operations (3.3%), gallery theater operations (17%) and rentals (17.74%).

<sup>10</sup>. The 63.88% figure represents the sum of 25.84% + 38.04%.

Furthermore, numerous provisions of the FUAs lack the "warmth and spontaneity indicative of charitable impulse." Korzen, *supra* at 158. For instance, applicant is not obligated to provide possession or use of any demised facilities unless user has made all payments due in a timely manner. In addition, the center may, without further notice of any kind to the user or anyone else, refuse to open the doors until such payments have been made.

The provisions governing default are likewise non-charitable because they do not relieve users of liability for unpaid balances and allow the center to retain any amounts paid prior to default. The prohibitions on fee refunds, combined with the insurance and renegotiation provisions, similarly establish that applicant enters into FUAs in furtherance of arm's length business transactions, not charitable endeavors. For this and all the aforementioned reasons, I conclude that the terms of applicant's FUAs are more akin to commercial leases than documents governing dispensation of charity.

I also find it significant that all users must pay a security deposit. Imposition of such deposits does not, *ipso facto*, warrant denial of applicant's exemption application. However, the relevant FUA provisions contain mandatory language which strongly suggests that users cannot perform at applicant's facilities without paying a security deposit. Furthermore, the FUAs submitted into evidence (Applicant Group Ex. No. 12) are devoid of any indication that applicant ever waived the deposit. These considerations, together with the aforementioned provisions setting forth draconian consequences for untimely payments, establish that it is factually impossible for applicant to make its facilities available to "persons who need and seek the benefits offered but are unable to pay ...[.]". Small v. Pangle, 60 Ill. 2d 510, 518 (1975); Du Page County Board of Review v. Joint Commission on Accreditation of Healthcare Organizations, 274 Ill. App. 3d 461, 471 (2nd Dist. 1995).

SBC argues that the FUAs should not be considered a barrier to exemption under the reasoning set forth in Decatur Sports Foundation v. Department of

Revenue, 177 Ill. App.3d 696 (4th Dist. 1988), (hereinafter "DSF"). There, the court held that property owned by appellant's foundation was exempt from real estate taxation under the then-existing version of Section 200/15-65.

That property contained numerous baseball diamonds. Appellant allowed a number local baseball and softball teams to use the diamonds pursuant to various lease agreements. This latter consideration makes it appear that DSF is similar to the present case. However, I conclude that DSF is distinguishable for several reasons: first, unlike SBC's articles of incorporation, those of the appellant contained references to charity which the Winnebago Home and ARC courts found important to establishing exempt organization. More importantly, the DSF court's analysis contained no references to Baldwin and failed to consider whether the leasing function, in and of itself, destroyed exemption.

Here, I expressly find that the subject parcel was primarily used for purposes which the Baldwin court found to be inherently non-exempt. Accordingly, I conclude that the analysis contained therein (rather than that set forth in DSF) controls the present case. Consequently, applicant's attempt to obtain exemption by reference to the DSF court's holding must fail.

The center also seeks to defeat the preceding analysis by arguing that its by-laws provide for reduced user fees. As noted above, such provisions do not establish that applicant, in fact, offers such reductions. Moreover, while the evidence of record establishes that applicant grants these reductions on a routine basis, (actions which I concede are unquestionably consistent with those of a charitable institution because they are based on the user's ability to pay), it fails to overcome the plethora of evidence which unequivocally establishes that the subject property was primarily used for non-exempt leasing during 1994.

This evidence is reinforced by the fact that SBC negotiates individual user fee abatements. Such abatements can be considered charitable in the present context because they assure that user fees reflect the lessee's ability to pay.

However, when viewed as part of the business transactions described above, both the negotiating process and the abatements themselves provide the center with mechanisms for ensuring that its lessors do not default on any monies payable. Thus, in light of the preceding discussion, it is reasonable to argue that the reduced fees have more to do with protecting SBC's non-exempt business interests than dispensing charity to those that use applicant's facilities.

Applicant also argues that some theater troupes and artisans have been allowed to perform or exhibit at its facilities without paying user or hanging fees. Despite this argument, only one of the eleven theater groups (Tight and Shiny Theater) paid no user fees in 1994. See, Applicant Ex. No. 15. Such an isolated example is legally insufficient to establish that applicant's operations are primarily charitable. MacMurray College v. Wright, 38 Ill. 2d 272 (1967). Of greater importance, however, is the following excerpt from Professor Kirk's testimony which demonstrates that this transaction (like all the others) was motivated by business considerations rather than charitable impulse:

Q. [By the ALJ] ... In 1994, were there ever any groups that came to you and said ... we would like to perform but we just don't have the money?

A. [By Professor Kirk] Yeah. Tight and Shiny did that. We worked out an agreement with them that they could perform without paying any money but they do [sic] provide in-kind services.

Q. What if they would not have performed in-kind services, would you still have allowed them to use the facilities?

A. Well, the point here is that we didn't want to be exclusionary, but on the other hand, they need to understand that in order to get the use of the 200 seats, [sic], state of the art theater, they ought to expect there ought to be some mode of earning that or paying for it.

Tr. pp. 37-38.

The latter portion of this testimony establishes that applicant expected something in return for the use of its space. Such an expectation, by its very

nature, runs contrary to the "gift" quality of charity set forth in Crerar v. Williams and Korzen, *supra*. Therefore, it does not establish that applicant's operations are primarily charitable.

With respect to hanging fees, I note that the record contains only one isolated example of waiver. Again, such example is legally insufficient to sustain applicant's burden of proof. Moreover, the record discloses that the curators (instead of the artists themselves) contract with the center and decide which artists will be included in a particular show. Thus, it appears likely that any charity dispensed would not be come from the applicant itself. Rather, it would be the indirect result of whatever discretion the center grants individual curators.

#### E. Other Considerations Effecting Applicant's Exempt Status

Taken as a whole, the preceding analysis demonstrates that the subject parcel was primarily used for non-exempt leasing purposes during 1994. Thus, any other uses, including the classes, coffee shop, readings, book exchange, etc. were (and remain) incidental. Consequently, applicant's attempt to obtain exemption by reference to these uses must fail.

I would note however, that some features of the incidental uses are distinctly non-charitable. For example, SBC allows individual instructors complete control of the classes they teach, including absolute discretion over fee abatements or waivers. Such discretion lacks the even-handed enforcement characteristic of a formal waiver policy and therefore, renders dispensation of such abatements or waivers speculative at best. Moreover, under the reasoning set forth above, applicant's failure to take an active role in this particular decision-making process establishes that any charity dispensed would come from the individual instructors rather than the applicant.

Applicant also argues that its ticket giveaways and advertising services provide evidence of exempt use. However, Findings of Fact 45 and 46 establish that the giveaways were undertaken primarily for non-exempt marketing purposes.

Even when marketing was not the primary motive, applicant did not admit those unable to pay without obtaining some sort of service in exchange. Thus, any complementary admissions given in consideration of such services violate the donative qualities of charity established in Korzen.

The evidence pertaining to SBC's advertising services is somewhat inconsistent with the FUA provisions that require the user to assume responsibility for promoting its particular activity. (See, Finding of Fact 33G). Given that the aforementioned rules of construction require that I interpret these provisions in a manner that would support taxation, it appears that each individual user bears the primary burden and cost of providing its own advertising. Thus, I conclude that any such services provided by applicant are incidental to its primary purpose, which I reiterate is leasing to artisans and theater groups. For this and all the aforementioned reasons, the Department's decision denying the subject parcel exemption from 1994 real estate taxes should be affirmed.

**WHEREFORE,** for all the above-stated reasons, the subject parcel should not be exempt from 1994 real estate tax.

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Date

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Alan I. Marcus,  
Administrative Law Judge